

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned On Briefs, October 22, 2009

**STATE OF TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES, v.
K.B.M., IN THE MATTER OF: G.M.M. (dob 5/18/2000) and S.A.M. (dob
1/14/1999) Children Under Eighteen (18) Years of Age**

**Direct Appeal from the Juvenile Court for Greene County
No. J-21238 Hon. Kenneth N. Bailey, Jr., Judge**

No. E2009-00967-COA-R3-PT - FILED DECEMBER 28, 2009

In this action to terminate the parental rights of the mother of her two minor children, the Trial Court held that the mother had abandoned the children by failure to visit the children within four months prior to the filing of the Petition for Termination, failure to comply with the terms of the permanency plan and found there were persistent conditions in the case that justified termination of the mother's parental rights. Further, the Trial Court held the mother's parental rights were terminated upon clear and convincing evidence and that clear and convincing evidence supported the Trial Court's determination that termination was in the best interest of the children. The mother has appealed. Upon our review, we conclude that the Trial Court properly found that clear and convincing evidence supported one statutory ground for termination of parental rights, and affirm the Judgment of the Trial Court, as modified.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Juvenile Court Affirmed as Modified.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Russell S. Veldman, Chucky, Tennessee, for appellant.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Amy T. McConnell, Assistant Attorney General, Nashville, Tennessee, for appellee.

OPINION

This is an appeal from an order terminating the parental rights of K.B.M. (Mother) to her children G.M.M. and S.A.M., which resulted from a petition filed by the Department of Children's Services on November 17, 2008. Following an evidentiary hearing, the Juvenile Court terminated the mother's parental rights, and made the following findings of fact: The children, G.M.M. and S.A.M. are doing well in school and are involved in sports. Both boys had expressed the desire to stay with their foster parents and stated they did not want to see their mother and are scared of her.

The Juvenile Court had ordered the mother's visits with the children to cease in August 2006 after she attempted to abduct the boys during visitation and further resisted the intervention of the police.

The background facts are not disputed. Since October, 2003, the mother's two other children, and G.M.M. and S.A.M., had been in the custody of the maternal grandmother and the mother's step-father. In October 2004, K.B.M. was arrested and incarcerated in Greene County Jail on a plea of custodial interference when she attempted to remove her children from her parents home. On March 21, 2005, the children's custodial grandmother died and their grandfather felt that he could no longer care for all four children.

On March 29, 2005, DCS filed a petition to adjudicate all four of K.B.M.'s children dependent and neglected and for emergency removal. The Juvenile Court entered a protective custody order on March 29, 2005, and on May 31, 2005, K.B.M. stipulated that her children were dependent and neglected at a hearing. At the time of the hearing, she was living in a homeless shelter, but was about to inherit \$40,000.00 from her mother's estate. Consequently, the Court ordered her to pay \$65.00 a month in child support.

Following an evidentiary hearing, the Trial Court entered the Order terminating the parental rights of the mother to the two children in this case. The mother has appealed and raises these issues:

- A. Whether the Department of Children's Services proved by clear and convincing evidence that K.B.M. willfully abandoned her children, G.M.M. and S.A.M.?
- B. Whether the Department of Children's Services proved by clear and convincing evidence that it made reasonable efforts to reunify the children, G.M.M. and S.A.M., with their mother, K.B.M.?
- C. Whether the Juvenile Court correctly terminated K.B.M.'s parental rights

based on clear and convincing evidence?

- D. Whether the Juvenile Court correctly found that termination of K.B.M.'s parental rights was in the best interests of the children, G.M.M. and S.A.M.?

Parties seeking termination of parental rights must prove two elements. First, they have the burden of proving there exists a statutory ground for termination. *In re Adoption of A.M.H.* 215 S.W.3d 793, 808 - 809 (Tenn. 2007), *rehrg. den., cert. den.* 551 U. S. 1146 (2007)(citing Tenn. Code Ann. § 36-1-113(c)(1) (2005)); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002)). Second, they must prove that termination of parental rights is in the child's best interest. *A.M.H.* at 809 (citing Tenn. Code Ann. § 36-1-113(c)(2) (2005); *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006)). Both elements must be established by clear and convincing evidence. *A.M.H.* at 809. The standard of clear and convincing evidence has been defined as “evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *In re Valentine* at 546.

The Juvenile Court held that DCS had proved that K.B.M. had abandoned G.M.M. and S.A.M. based on her failure to visit them since August 2007 when the Court ordered that her right to visitation with the children cease because she had attempted to abduct them. This period of time included the four months prior to the filing of the petition for termination. The Court concluded that her failure to visit was willful because she had not petitioned the Court to reinstate her right to visitation. The Juvenile Court also found that DCS had proved by clear and convincing evidence that K.B.M. had willfully abandoned the children based upon her failure to pay child support as required by the permanency plan during the four months preceding the filing of the Petition to Terminate Parental Rights. K.B.M. contends that her failure to visit was not willful because she had been denied the right to visitation by court order and that her failure to pay child support was likewise not willful because she was unable to work due to a disability. The appellee evidentially concedes this issue, but there are other statutory grounds to terminate the parental rights.

Appellant contends that DCS failed to prove by clear and convincing evidence that it made reasonable efforts to reunify the children with their mother and that this failure invalidates the Juvenile Court's finding that failure to substantially comply with the permanency plan and persistent conditions were ground for termination. While DCS does not address this issue directly in their brief, it focused on the issue that it proved by clear and convincing evidence that K.B.M. did not substantially comply with the permanency plan.¹ Appellant does not contend that K.B.M. substantially complied with the plan, as there was overwhelming evidence presented that she did not.

¹DCS did not pursue the persistent conditions finding because the children were removed from the custody of their grandfather, with whom they had lived since October 2003, not from the home of K.M.

While the appellant argued that DCS did not make reasonable efforts to unify her with the children, this argument is without merit because there is ample clear and convincing evidence to the contrary. Also, there is clear and convincing evidence as found by the Trial Court that it is in the children's best interest to terminate the mother's parental rights.

Appellant did not appeal the finding of the Trial Court that termination of the mother's rights was supported by clear and convincing evidence that the mother had failed to substantially comply with the permanency plan. It is unnecessary to further address this issue.

In sum, the Juvenile Court's Order to terminate the parental rights of K.B.M. for failure to substantially comply with the permanency plan is affirmed, and there is clear and convincing evidence that termination is in the children's best interest.

We affirm, as modified, the Trial Court's Judgment terminating the parental rights of K.B.M. to G.M.M. and S.A.M., and assess the cost of the appeal to K.B.M.

HERSCHEL PICKENS FRANKS, P.J.